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1 (d) The nature of the goods or services which the seller is offering or promoting.

2 (2) MAKING THE DISCLOSURES. A seller shall make the disclosures under sub. (1)  
3 before asking any questions or making any statements to a consumer, other than an initial  
4 greeting. The seller shall make the disclosures orally and in writing.

5 (3) FICTITIOUS NAMES. (a) A seller may not use any fictitious name under sub. (1)(a)  
6 or s. ATCP 127.64(1)(d), except that a seller may use a trade name if all of the following  
7 apply:

- 8 1. The seller is widely known by and consistently does business under that name.
- 9 2. The name does not have the tendency or capacity to confuse or mislead the  
10 consumer as to the seller's true identity.

11 (b) An individual making face-to-face solicitations as an employee or agent of  
12 another seller may disclose a fictitious individual name under sub. (1)(b) if all of the  
13 following apply:

- 14 1. No other individual making face-to-face solicitations for the same seller uses the  
15 same fictitious name.
- 16 2. The seller for whom the individual is making the face-to-face solicitation keeps  
17 records under s. ATCP 127.76(1)(d) that correlate the fictitious name with the actual name  
18 and address of the individual seller.

19 **NOTE:** Subsection (3)(b) balances the needs of consumers against the privacy  
20 interests of individuals employed to make face-to-face solicitations on  
21 behalf of a seller.

1  
2       **ATCP 127.64 Disclosures prior to sale. (1) DISCLOSURES REQUIRED.** In a face-to-  
3 face transaction, a seller shall disclose all of the following to a consumer, in writing, before  
4 the consumer enters into any purchase contract and before the seller takes the consumer's  
5 credit card number or accepts any payment from the consumer:

6       (a) The nature and quantity of consumer goods or services included in the sale.

7       (b) The total cost to purchase and receive the consumer goods or services.

8       (c) All material terms and conditions affecting the sale, receipt or use of the consumer  
9 goods or services, including credit terms if any.

10       **NOTE:** Consumer credit disclosures under par. (c) must comply with applicable  
11 requirements under ch. 422, Stats., and federal law.  
12

13       (d) The name, mailing address and telephone number of the principal seller.

14       **NOTE:** For example, an individual making face-to-face solicitations on behalf of  
15 the ABC company must disclose the name, address and telephone number  
16 of that company.  
17

18       (e) The seller's policy related to refunds, cancellations, exchanges or repurchases if  
19 any of the following apply:

20       1. The seller has a policy that prevents or substantially limits refunds, cancellations,  
21 exchanges or repurchases.

22       2. The seller makes any claim or representation regarding refunds, cancellations,  
23 exchanges or repurchases.

1       (2) COPIES OF SALES AGREEMENTS. Whenever a consumer signs any written  
2 agreement in a face-to-face transaction, the seller shall provide the consumer with a true  
3 copy of that agreement.

4       (3) LANGUAGE OTHER THAN ENGLISH. (a) If the primary language used in a face-to-  
5 face solicitation is not English, the seller shall make the disclosures under sub. (1) in the  
6 language primarily used.

7       (b) If the primary language used in a face-to-face transaction is not English, every  
8 written agreement signed by the consumer shall be in English and the language primarily  
9 used.

10       **ATCP 127.66 Prize promotions.** (1) **ILLEGAL LOTTERIES.** In a face-to-face  
11 transaction, no seller may use a prize promotion that violates s. 945.02(3), Stats.

12       (2) **PRIZE NOTICE; REQUIREMENTS.** In a face-to-face transaction, no seller may use a  
13 prize promotion that violates s. 100.171, Stats.

14       (3) **PRIZE PROMOTIONS; MISREPRESENTATIONS.** No seller may misrepresent the  
15 material terms of a prize promotion used in a face-to-face transaction.

16       **ATCP 127.68 Unauthorized payment.** No seller in a face-to-face transaction may  
17 obtain or submit for payment any check, draft or other negotiable instrument drawn on a  
18 consumer's account without that consumer's express, written authorization. Express  
19 written authorization may include the customer's signature on the check, draft or negotiable  
20 instrument.

1       **ATCP 127.70 Credit card laundering.** (1) No merchant may present to or deposit  
2 into a credit card system for payment, or cause another person to present to or deposit into  
3 a credit card system for payment, any credit card sales draft generated by a face-to-face  
4 transaction that is not a sale by that merchant to the holder of that credit card.

5       (2) No person may employ, solicit or cause a merchant to violate sub. (1).

6       (3) No seller engaged in a face-to-face transaction may, by means of a business  
7 relationship or affiliation with a merchant, obtain access to a credit card system unless that  
8 access is authorized by that merchant's written agreement with the credit card system  
9 operator, or with an acquirer licensed or authorized by the credit card system operator.

10       **ATCP 127.72 Misrepresentations.** No seller may do any of the following, directly  
11 or by implication, in a face-to-face transaction:

12       (1) Misrepresent a seller's identity, affiliation, location or characteristics.

13       (2) Misrepresent the nature, purpose or intended length of a face-to-face solicitation.

14       (3) Misrepresent the nature or terms of a face-to-face transaction, or any document  
15 related to that transaction.

16       (4) Misrepresent the cost of goods or services offered or promoted by a seller, or fail  
17 to disclose material costs payable by the consumer.

18       (5) Misrepresent the nature, quantity, material characteristics, performance or efficacy  
19 of the goods or services offered or promoted by a seller.

1 (6) Misrepresent or fail to disclose material restrictions, limitations or conditions on  
2 the purchase, receipt, use or return of goods or services offered or promoted by a seller.

3 (7) Misrepresent the material terms of a seller's refund, cancellation, exchange,  
4 repurchase or warranty policies.

5 (8) Misrepresent that a seller is offering consumer goods or services free of charge or  
6 at a reduced price.

7 (9) Misrepresent that a seller is affiliated with, or endorsed by, any government or  
8 3rd-party organization.

9 (10) Represent that the seller has specially selected the consumer unless the  
10 representation is true and the seller concurrently discloses to the consumer the specific  
11 basis on which the seller makes the representation. The seller may not misrepresent that  
12 basis.

13 (11) Represent that the seller is conducting a special sales promotion, is making a  
14 special offer limited to a few persons, is making a special offer for a limited period of time,  
15 or is authorized to place the offered goods or services in a limited number of homes, unless  
16 the representation is true and the seller concurrently discloses to the consumer the specific  
17 basis on which the representation is made. The seller may not misrepresent that basis.

18 (12) Represent that the seller is participating in a contest or conducting a survey  
19 unless the representation is true and all of the following apply:

20 (a) The seller first makes all of the opening disclosures under s. ATCP 127.62.

(b) The seller concurrently discloses the name of the contest or survey sponsor, and the specific terms of the contest or survey.

(c) The seller concurrently discloses that the seller is attempting to sell goods or services, or to obtain information to identify sales prospects, if that is the case.

(13) Misrepresent any material aspect of a personal investment opportunity offered to the consumer, including any aspect such as risk, liquidity, earnings potential or profitability.

(14) Fail to disclose, in connection with every purported offer of free goods or services in a face-to-face transaction, any costs which the consumer must incur and any conditions which the consumer must meet in order to receive those free goods or services. This does not prohibit a combination offer that is covered by, and complies with, s. 100.18(2), Stats.

(15) Make any false, deceptive or misleading representation to a consumer.

**ATCP 127.74 Prohibited practices.** No seller may do any of the following in a face-to-face transaction:

(1) Threaten, intimidate or harass a consumer.

(2) Fail to leave a consumer's premises upon request.

(3) Request or receive payment for seeking or arranging a loan or extension of credit until the consumer actually receives that loan or extension of credit, if the seller has represented that efforts to obtain a loan or extension of credit would likely be successful.

(4) Fail to do either of the following if the transaction qualifies as a consumer approval transaction under s. 423.201, Stats., and is not subject to s. 423.202(4), Stats.:

(a) Provide a notice under s. 423.203, Stats., of the consumer's right to cancel.

(b) Honor the consumer's right to cancel under s. 423.202, Stats.

**NOTE:** Under s. 423.202, Stats., a consumer may cancel a consumer approval transaction until midnight of the 3rd business day after the seller gives the consumer a required written notice of cancellation rights under s. 423.203, Stats. The consumer's cancellation rights under s. 423.202, Stats., are in addition to any other cancellation rights which the consumer may have under contract law.

**ATCP 127.76 Recordkeeping. (1) RECORDS REQUIRED.** A seller engaged in face-to-face transactions shall keep all of the following records related to those transactions:

(a) Copies of all advertising, brochures, sales scripts, seller training materials, sales and promotional materials, and documents provided to consumers in face-to-face transactions. This paragraph does not require a seller to keep duplicate copies of substantially identical documents.

(b) The following records related to each prize which the seller offers or awards to consumers if the seller represents to any consumer, directly or by implication, that the prize has a value of \$25 or more:

1. An identification of the prize.

2. The name and last known address of every consumer who received the prize.



1 (c) The name and last known address of every consumer who purchased goods or  
2 services in a face-to-face transaction with the seller, the date on which the consumer  
3 purchased those goods or services, the date on which the seller provided those goods or  
4 services to the consumer, and the amount which the consumer paid for those goods or  
5 services.

6 (d) The following information related to every individual who has made face-to-face  
7 solicitations as the seller's employee or agent:

8 1. The individual's name, last known address and telephone number.

9 2. Every fictitious name which the individual has used when making face-to-face  
10 solicitations. No seller may permit more than one employee or contract agent to use the  
11 same fictitious name.

12 3. The individual's job title or titles.

13 (e) All written authorizations required under s. ATCP 127.68.

14 (2) KEEPING RECORDS. (a) A seller shall keep each record required under sub. (1) for  
15 at least 2 years after the seller creates that record.

16 **NOTE:** A seller may keep records required under sub. (1) in the form, manner,  
17 format and place in which the seller would normally keep those records in  
18 the ordinary course of business.

19 (b) The department, pursuant to an investigation of possible violations of this  
20 subchapter, may ask a seller to provide copies of records under sub. (1) that are reasonably  
21

1 relevant to that investigation. The seller shall provide the requested copies within a  
2 reasonable time specified by the department.

3 **NOTE:** See ss. 93.15 and 93.16, Stats.  
4

5 (c) An agent engaged in face-to-face transactions on behalf of a principal seller need  
6 not keep duplicate copies of records which that principal seller keeps according to this  
7 section. A principal seller who contracts to have an agent keep records for the principal  
8 seller need not keep duplicate copies of records which that agent keeps according to that  
9 contract and this section. An employee need not keep duplicate copies of records that his  
10 or her employer keeps according to this section.

11 **ATCP 127.78 Assisting violations.** No person may knowingly assist any seller to  
12 engage in any activity or practice in violation of this subchapter.

13  
14 **EFFECTIVE DATE.** The rules contained in this rulemaking order shall take effect  
15 on the first day of the month following publication in the Wisconsin administrative  
16 register, as provided under s. 227.22(2)(intro.), Stats.

17  
18 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.  
19

20 STATE OF WISCONSIN  
21 DEPARTMENT OF AGRICULTURE,  
22 TRADE AND CONSUMER PROTECTION  
23

24  
25 By \_\_\_\_\_  
26 Ben Brancel, Secretary



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection  
Ben Brancel, Secretary



May 19, 1999

The Honorable Sue Jeskewitz, Chairperson  
Assembly Committee on Consumer Affairs  
P.O. Box 8952  
Madison, WI 53707-8952

Re: **Direct Marketing Rule (Clearinghouse Rule 98-117)**

Dear Representative Jeskewitz:

Pursuant to s. 227.19(4)(6)3., Stats., the department will make the following germane modification to the Direct Marketing Rule (Clearinghouse Rule 98-117) that we submitted to the Legislature on March 17, 1999:

- On page 20, line 24, add the words "credit union" as follows:

"association, credit union, insurance company, public utility or telecommunications carrier engaged in"

The department will also add two notes to the rule:

- On page 21, after line 19:

**NOTE:** Paragraph (b) does not except a face-to-face communication.

- On page 22, after line 8:

**NOTE:** A "solicitation" under sub. (22) is covered by this rule even though it is not the first communication between the seller and the consumer.

We have informed the DATCP Board of these changes. Unless there are objections from the Board, we will make the changes as stated. We do not anticipate any Board objections.

Sincerely,

*Ben Brancel*

Ben Brancel, Secretary



State of Wisconsin  
Tommy G. Thompson, Governor



**Department of Agriculture, Trade and Consumer Protection**  
Ben Brancel, Secretary

DATE: March 17, 1999

TO: The Honorable Fred Risser  
President, Wisconsin State Senate  
Room 220 South, State Capitol  
Madison, WI 53703

The Honorable Scott Jensen  
Speaker, Wisconsin State Assembly  
Room 211 North, State Capitol  
Madison, WI 53703

FROM: Ben Brancel, Secretary *Ben Brancel*  
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Direct Marketing Rule (Clearinghouse Rule 98-117)**

Pursuant to ss. 227.19(2) and (3), Stats., the Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review. We are enclosing three copies of the final draft rule, together with the following report. Pursuant to s. 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

**Background**

This rule protects Wisconsin consumers against unfair and deceptive direct marketing practices. Direct marketing includes telemarketing, direct mail, and face-to-face selling away from the seller's regular place of business. This rule is designed to protect Wisconsin consumers against unscrupulous practices without hurting legitimate sellers.

This rule updates and strengthens the department's current home solicitation selling rules under ch. ATCP 127, Wis. Adm. Code. This rule is based, in part, on Federal Trade Commission telemarketing rules which took effect on December 31, 1995. However, this rule also protects consumers in other transactions, including direct mail and door-to-door transactions. It also goes beyond FTC telemarketing rules to cover intrastate transactions and new electronic sales methods, such as fax and e-mail.

Honorable Fred Risser  
Honorable Scott Jensen  
March 17, 1999  
Page 2

This rule will provide more effective prevention, and more effective redress for consumers. It will harmonize current state and federal requirements, and will update current rules to meet the demands of the "new marketplace."

Persons who violate this rule may be prosecuted under state law in Wisconsin courts. Consumers who suffer a monetary loss because of a rule violation may also sue the violator directly, and may recover double damages, costs and reasonable attorney fees.

The department developed this rule in consultation with interested parties including the Department of Justice, the Direct Marketing Association, and other consumer and business groups. The department believes that there is broad consensus and support for this rule. The DATCP Board unanimously approved this final draft rule on February 23, 1999.

### Rule Contents

#### **Coverage**

This rule applies to the direct marketing of consumer goods or services by any of the following methods:

- Telephone solicitations (including telephone, video conferencing or other interactive electronic voice communications).
- Mail solicitations (including e-mail and fax solicitations).
- Face-to-face solicitations (e.g., door-to-door solicitations) at a place other than the seller's regular place of business.

This rule does not apply to any of the following:

- Mass advertisements (such as newspaper, television or radio ads, or internet home pages) which are not addressed to individual consumers or consumer residences.
- Transactions at a seller's regular place of business, or at an established public market (e.g., a farmer's market).
- Catalog sales.

- Telephone, mail or electronic communications initiated by a consumer, unless prompted by the seller's direct marketing solicitation to the consumer.
- Mail solicitations that merely invite consumers to the seller's regular place of business.
- The delivery of goods or services which the consumer purchased in a transaction that was not a direct marketing transaction covered by this rule.
- Persons (such as homeowners holding occasional "garage sales") who are not in the "business" of selling.
- Business-to-business sales.
- Banks, savings and loan associations, insurance companies, public utilities or telecommunications carriers whose activities are exempt under s. 93.01(1m), Stats.
- Real estate sales, other than sales of cemetery lots and "time shares" as defined in s. 707.02(24), Stats.
- Securities sold in compliance with ch. 551, Stats., or franchise investments sold in compliance with ch. 553, Stats.
- Pay-per-call services sold in compliance with s. 196.208, Stats.
- Newspaper subscriptions that a customer may cancel at any time without penalty.

As a convenience to readers, this rule has separate subchapters for telephone, mail and face-to-face solicitations. The rules for telephone, mail and face-to-face solicitations are very similar. However, there are some differences reflecting different selling methods and technologies.

### **Opening Disclosures**

Under this rule, direct marketing solicitations must include certain opening disclosures. An individual making telephone or face-to-face solicitations must make these disclosures before making any statements other than an initial greeting. The seller must disclose:

- The name of the principal seller.
- The name of the individual making the solicitation (if telephone or face-to-face).

- That the seller is offering or promoting the sale of consumer goods or services.
- The kind of goods or services which the seller is offering or promoting.

#### **Disclosures Prior to Sale**

In a direct marketing transaction, a seller must make certain disclosures before a consumer enters into a purchase contract, and before the seller takes the consumer's credit card number or accepts any payment from the consumer. In a mail or face-to-face transaction, the seller must make these disclosures in writing. In a telephone transaction, the seller may make the disclosures orally if the seller confirms in writing according to this rule. The seller must disclose:

- The nature and quantity of the consumer goods or services included in the sale.
- The cost of the consumer goods or services.
- All material terms and conditions affecting the sale, receipt or use of the consumer goods or services.
- The seller's refund or cancellation policy (if the seller makes any claims about refunds or cancellations, or has a policy that may prevent or limit them).
- The name of the principal seller and a way to contact the seller:
  - \* In a telephone transaction, the seller must disclose an address or a toll-free telephone number (at which the consumer can also obtain the seller's address).
  - \* In a mail transaction, the seller must disclose an address.
  - \* In a face-to-face transaction, the seller must disclose an address and telephone number (not necessarily toll-free).

If the primary language used in a direct marketing transaction is not English, the seller must make the pre-sale disclosures in the language primarily used. Written agreements must be in English and the language primarily used. In a face-to-face transaction, the seller must give the consumer a copy of any agreement signed by the consumer.

### **Prize Promotions**

This rule prohibits direct marketers from using prize promotions that violate s. 945.02(3), Stats. (lottery law) or s. 100.71, Stats. (prize notice law). This rule also prohibits a direct marketer from misrepresenting the material terms of a prize promotion.

### **Unauthorized Payment**

Under this rule, no home solicitation seller may obtain or submit for payment any check, draft or other negotiable instrument drawn on a consumer's account without that consumer's express, verifiable authorization. In a face-to-face transaction, the authorization must be in writing. In a telephone or mail transaction (where the consumer orders by phone), the authorization may include a tape recording or other verifiable authorization that complies with this rule. The standards for telephone authorizations are the same standards specified in the FTC telemarketing rules.

### **Credit Card Laundering**

This rule prohibits "credit card laundering" related to direct marketing transactions. In "credit card laundering" schemes, unscrupulous sellers gain access to the credit card system (from which they would normally be excluded) by processing credit card transactions under the name of another merchant.

### **Misrepresentations**

This rule generally prohibits false, deceptive or misleading representations in a home solicitation transaction. It specifically prohibits a number of common misrepresentations.

### **Prohibited Practices; General**

This rule prohibits a seller from doing any of the following in a direct marketing transaction:

- Threatening, intimidating or harassing a consumer.
- Failing to leave a consumer's premises upon request.
- Requesting or receiving payment for "loan finder" services until the consumer actually receives the promised loan.



### **Prohibited Telephone Solicitation Practices**

This rule prohibits a telemarketer from doing any of the following:

- Repeatedly or continuously causing a consumer's telephone to ring, or repeatedly or continuously engaging any consumer in telephone conversation, in order to annoy, abuse or harass a consumer.
- Initiating a telephone solicitation to a consumer who has previously stated that he or she does not wish to receive telephone solicitations from that seller.
- Initiating a telephone solicitation to a consumer before 8:00 AM or after 9:00 PM without the prior consent of the consumer.

### **Recordkeeping**

This rule requires a direct marketer to keep records of direct marketing transactions for at least 2 years. The rule establishes slightly different recordkeeping requirements for telephone, mail and face-to-face sellers.

### **Changes from Hearing Draft**

In response to hearing testimony, the department made a number of changes to the hearing draft. Changes included the following:

- The final draft rule is retitled "Direct Marketing" (rather than "Home Solicitation Selling"). The term "direct marketing" is more widely understood, and more clearly encompasses telephone, mail and face-to-face solicitations.
- The final draft breaks the rule into subchapters. There are separate subchapters for telephone, mail and face-to-face solicitations. This makes the rule longer, because some material is repeated between subchapters. However, readers interested in a particular type of direct marketing can now refer directly to the relevant subchapter, without having to read any unrelated material. Although the rules for telephone, mail and face-to-face solicitations are similar, there are some differences reflecting different selling methods and technologies.
- The final draft simplifies and clarifies the definitions contained in the hearing draft, so the rule will be easier to understand.

- The final draft clarifies that this rule, like the current rule, applies to face-to-face solicitations at any place other than the seller's regular place of business. The final draft also clarifies that this rule does not apply to:
  - \* Routine transactions at an established public market (e.g., a farmers market).
  - \* Telephone, mail or electronic communications initiated by the consumer, unless prompted by the seller's prior direct marketing solicitation.
  - \* Mail solicitations that merely invite the consumer to the seller's regular place of business.
  - \* The delivery, to a consumer's home, of goods or services sold in a transaction other than a direct marketing transaction.
- The final draft rule clarifies that, if a sales transaction is initiated by a direct marketing solicitation, the entire transaction is covered by this rule. Certain portions of this rule (opening disclosures) apply only to the initial solicitation. Other portions (contract disclosures and prohibited practices) apply to the entire transaction.
- The final draft rule deletes prize promotion provisions which duplicated s. 945.02(3), Stats. (lottery law) and s. 100.71, Stats. (prize notice law). Instead, the final draft rule simply incorporates these existing laws by reference.
- The final draft rule deletes hearing draft provisions related to "credit repair" schemes. These provisions were based on Federal Trade Commission rule provisions. However, the Department of Justice noted that the U.S. Congress (15 USC 1679) and the Wisconsin Legislature (s. 422.501, Stats., et seq.) have enacted laws that deal with these schemes in greater detail, so the rules are no longer necessary.
- The final draft rule prohibits certain home solicitation schemes in greater detail (per current ATCP 127). For example, it specifically prohibits a seller from representing that the seller is participating in a "contest" or "survey," unless the representation is true and the seller discloses the specific basis for the statement.
- The final draft clarifies the disclosures which a home solicitation seller must make prior to sale, and clarifies the manner in which the seller must make those disclosures. The final draft recognizes differences between telephone, mail and face-to-face transactions.

- The final draft provides that a face-to-face seller may not submit for payment any credit card sales draft or other negotiable instrument drawn on a consumer's account without the consumer's express, written authorization. In mail or telephone transactions (where the consumer orders by phone), the final draft allows other verifiable authorizations such as tape recordings just like the FTC telemarketing rule.
- The final draft clarifies the responsibilities of the principal seller and the seller's agents. For example, the final draft clarifies that an employee or agent is not required to keep duplicate copies of records kept by the principal seller. A principal seller may also contract with an agent to keep records for the principal seller.
- The final draft rule makes technical drafting changes to clarify the rule and comply with state drafting standards.

#### **Response to Rules Clearinghouse Comments**

The Legislative Council Rules Clearinghouse made minor technical comments on the hearing draft rule. The final draft rule addresses all of the Rules Clearinghouse comments.

#### **Fiscal Estimate**

This rule is not expected to have a significant fiscal effect on the department. See fiscal estimate attached.

#### **Small Business Analysis**

This rule is not expected to have an adverse effect on reputable businesses. The rule will prevent unscrupulous businesses from using deceptive practices to gain a competitive advantage. A small business analysis is attached.

#### **Hearing Testimony**

The department held 5 public hearings on this rule, from October 5 to October 9, 1999. The department held hearings in Madison, Milwaukee, Green Bay, Wausau and Eau Claire. The department also accepted written comments until November 6, 1999. The department modified the final draft rule in response to hearing comments. The department consulted with the Department of Justice on the final draft modifications. The following persons appeared at the hearings or provided written comments for the hearing record:

Honorable Fred Risser  
Honorable Scott Jensen  
March 17, 1999  
Page 9

- Direct Selling Association, Washington, DC. Concerned that prizes given in connection with home party sales not be violations of the rule.
- John C. Buellsbach, New Berlin, WI. Opposed to changes that would limit coverage of current rules specifically as they apply to transactions occurring at the seller's home.
- Mark Roob, Wauwatosa, WI. Opposed to rules that cover any transaction other than one solicited and consummated face-to-face at the consumer's home.
- Anne W. Gehring, Wisconsin Credit Union League, Hartford, WI. Limited opposition to exemption for financial institutions other than credit unions.
- Mary Kay Norman, Brown County Commission on Aging, Green Bay, WI. Supports rules that protect the elderly.
- Cheryl Gain, Wis. Department of Commerce, Madison, WI. Observing hearings.
- Steve Meili, Mike Koehler, Marsha Mortenson, Center for Public Representation, Madison, WI. Concerns about hearing draft scope and consistency with other state laws and federal rules. The Center also recommended technical changes for clarification.
- James Lake, AARP, Madison, WI. Support of rules. Recommend authorizations for payments only be in writing.
- Eric Peterson, Wimmer & Company, Madison, WI Representing the Direct Marketing Association. Requested a variety of rule changes related to telemarketing and direct mail.
- C. Edward Watson, Attorney for AT&T, Chicago, IL. Technical changes to ensure that telecommunications providers covered under other rules are not also covered by ATCP 127.
- Wisconsin Newspaper Association, Madison, WI. Requesting that newspaper deliveries can commence prior to written confirmation of the subscription is delivered to the consumer.

## FISCAL ESTIMATE

DOA-2048 (R 10/94)

☒ ORIGINAL      ☐ UPDATED  
☐ CORRECTED      ☐ SUPPLEMENTAL
LRB or Bill No. / Adm. Rule No.  
ATCP 127

Amendment No. (If Applicable)

## Subject

Direct Marketing

## Fiscal Effect

State: ☒ No State Fiscal EffectCheck columns below only if bill makes a direct appropriation  
or affects a sum sufficient appropriation
☐ Increase Existing Appropriation    ☐ Increase Existing Revenues  
☐ Decrease Existing Appropriation    ☐ Decrease Existing Revenues  
☐ Create New Appropriation

☐ Increase Costs - May be possible  
to Absorb Within Agency's  
Budget    ☐ Yes    ☐ No
☐ Decrease CostsLocal: ☒ No local government costs
1. ☐ Increase Costs  
☐ Permissive    ☐ Mandatory  
2. ☐ Decrease Costs  
☐ Permissive    ☐ Mandatory

3. ☐ Increase Revenues  
☐ Permissive    ☐ Mandatory  
4. ☐ Decrease Revenues  
☐ Permissive    ☐ Mandatory
5. Types of Local Governmental Unit  
Affected:
☐ Towns    ☐ Villages    ☐ Cities  
☐ Counties    ☐ Others \_\_\_\_\_  
☐ School Districts    ☐ WTCS Districts

## Fund Source Affected

☒ GPR    ☐ FED    ☐ PRO    ☐ PRS    ☐ SEG    ☐ SEG-S

Affected Ch. 20 Appropriations

## Assumptions Used in Arriving at Fiscal Estimate

This rule amendment updates and modernizes existing rules related to Direct Marketing. It also harmonizes state regulations with federal telemarketing rules. The revised rule requires information be given to consumers who are solicited away from regular business establishments about the product, costs, and identity of seller. The bill also prohibits certain deceptive practices.

The department already handles over 4,000 complaints annually from consumers about transactions which are initiated or consummated away from the sellers regular place of business. It is assumed that the number of complaints will not increase due to this revision. It is also assumed that this law will assist department staff by providing clearer definitions which, when applied, will enhance our efficiency in dealing with these problems.

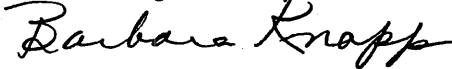
Based on these assumptions, the department believes there is no fiscal effect associated with amendment of this rule.

## Long - Range Fiscal Implications

Agency/prepared by: (Name &amp; Phone No.)

DATCP  
Jim Rabbitt (608) 224-4965

Authorized Signature/Telephone No.

  
Barbara Knapp (608) 224-4746

Date

2/9/99

## Final Regulatory Flexibility Analysis

Proposed ch. ATPC 127, Wis. Adm. Code

### Direct Marketing

This rule regulates businesses that solicit and sell consumer goods by mail, telephone, other electronic means such as e-mail or facsimile, or in face-to-face transactions away from the seller's regular place of business. The rule provides methods whereby buyers can be informed of the conditions of their agreements in a manner that is meaningful and available to the consumer after the transaction is done and the seller no longer available.

These requirements should have little if any impact on small business. It is general business practice to inform potential customers who you are and the product you are selling and to produce invoices following the sale. It is also general practice to retain business records for a period of time for tax and other purposes. The practices regulated by the prize promotion, unauthorized payment, telephone solicitation, and credit card laundering sections have been identified at federal rules hearings as practices which have lead to abuse of consumers and are already in effect for any business that solicits on an interstate scale. Businesses recordkeeping requirements are necessary for meaningful enforcement of the rules and should be already the norm for most businesses.

### Scope

This rule modernizes the restrictions on small business created by the current ch. ATPC 127, Wis. Adm. Code, which was promulgated in 1972. This rule also incorporates the provisions of the Federal Trade Commission telemarketing rules, and clarifies and expands its scope to include other electronic communications such as e-mail and telefax, and direct mail.

This rule does not apply to sales at the seller's regular place of business, catalog sales, mass advertising, an established public market such as a farmer's market, or business to business sales. This rule does not apply to financial institutions, insurance companies, utilities, or real estate sales (other than cemetery lots and "time shares").

### Opening Disclosures

This rule requires initial disclosures such as the seller's correct name, the name of the individual making the solicitation, the fact that the seller is offering or promoting a sale of goods or services, and the kind of goods or services the seller is offering or promoting.

These disclosures must be made orally, if the direct marketing involves an oral or face-to-face communication and in writing, if the direct marketing involves a written or face-to-face solicitation.

These requirements should have no significant impact on small business. Most sellers, as a matter of preference, leave written information about their company and products with the consumer whenever engaged in a home solicitation.

### Disclosures Prior to Sale

Before the sale or acceptance of payment, a seller must disclose the material terms and conditions of sale. These requirements add no additional cost to legitimate small business who already provide this information to consumers.

### Unauthorized Payment

Under this rule, no seller may obtain or submit any negotiable instrument drawn on a consumer's account without express, verifiable authorization. Authorizations may be written or oral, and must be verifiable by writing or tape recording. Honest businesses should have no objection to these provisions. Businesses that wish to tape record oral authorizations may find it necessary to make a one time purchase of equipment.

### Credit Card Laundering

This rule prohibits "credit card laundering" schemes by which unscrupulous sellers gain access to the credit card system by processing credit card transactions under the name of another merchant. This section targets only those sellers engaged in unscrupulous practices and should have no impact on legitimate small business.

### Misrepresentations

This rule prohibits the seller from misrepresenting any of the following:

- The seller's identity, affiliation, location or characteristics or the nature, purpose or intended length of a home solicitation.
- The cost, nature or terms of purchase, including restrictions, limitations or conditions on the receipt, use or return of goods or services. This rule requires affirmative disclosure of key sales terms.
- The nature, quantity, or material characteristics of the goods or services.
- That the seller has specifically chosen the consumer or is making special sales promotion limited to a few individuals, unless this is true and the basis for the representation is revealed.

- That the seller is participating in a contest or conducting a survey unless it is true and the seller describes the contest or survey.
- That a seller is affiliated with, or endorsed by, any government or 3rd-party organization or has specially selected the consumer.
- Any material aspect of an investment opportunity, including risk, liquidity, earnings potential or profitability.

These prohibitions should pose no problem for honest businesses, and should place no additional burden on small businesses. For the most part, they merely continue prohibitions contained in current rules.

#### Prohibited Practices; General

This rule prohibits a seller from doing any of the following in a direct marketing transaction:

- Threatening, intimidating, or harassing a consumer.
- Failing to leave a consumer's premises upon request.
- Requesting or receiving payment for "loan finder" services until the consumer actually receives the promised loan.

These prohibitions should pose no problem for honest businesses, and should place no additional burden on small businesses. For the most part, they merely continue prohibitions contained in current rules.

#### Prohibited Telephone Solicitation Practices

This rule prohibits a direct marketing seller from doing any of the following:

- Initiating a telephone solicitation to a consumer who has previously stated that he or she does not wish to receive telephone solicitations from the seller.
- Repeatedly causing a consumer's telephone to ring, or repeatedly engaging a consumer in telephone conversation, with intent to annoy, abuse or harass a consumer.
- Initiating a telephone solicitation before 8:00 AM or after 9:00 PM without the prior consent.

These prohibitions are consistent with FTC rule provisions, and should pose no problem for legitimate telemarketers.



### Recordkeeping

This rule requires a direct marketing seller to keep copies of all solicitation scripts and documents, transaction receipts, a description of each prize offered and the name and address of every consumer who received a prize. The rule also requires a seller to keep the real names, any fictitious name(s) used, address and telephone number, and job title or titles of individual solicitors acting on the seller's behalf.

This section is similar to the federal telemarketing rule requirements. Additionally, the records to be kept are generally held by small business for other purposes. Therefore, there should be no fiscal impact to most small business. There will be some limited fiscal impact to small business who do not otherwise come under the federal rules and do not otherwise keep the required documentation.

### Small Business Impact; Summary

The impact on small business should be limited to those who are not already covered by federal telemarketing rules or current DATCP rules under ch. ATCP 127, Wis. Adm. Code. Some small businesses may need to purchase equipment to tape record telephone authorizations from consumers. Most other requirements can be met by adhering to normal good business and recordkeeping practices. This rule will not ordinarily require small businesses to retain additional professional services.

Dated this 9th day of February, 1999.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By: 

William L. Oemichen, Administrator  
Division of Trade and Consumer Protection



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection  
Ben Brancel, Secretary



April 21, 1999

The Honorable Gary George, Chairperson  
Senate Committee on Judiciary and Consumer Affairs  
Room 118 South, State Capitol  
P.O. Box 7882  
Madison, WI 53707-7882

Dear Senator George:

**Re: Direct Marketing Rule**

I am responding to questions from your Committee Clerk, Dan Rossmiller, about a final draft DATCP rule related to direct marketing. *This rule strengthens and modernizes current rules under ch. ATCP 127.* The rule is supported by the Department of Justice, consumer groups and the affected business community.

**Jurisdiction**

This rule expands the coverage of the current rules because it would apply to mail solicitations (including e-mail and fax solicitations). The current rule applies to face-to-face and telephone solicitations, but does not apply to mail solicitations. This rule, like the current rule, exempts general advertisements, catalog sales, and sales at a seller's regular place of business. (These exempt transactions are covered by other laws, such as the deceptive advertising law.)

This rule, like the current rule, applies to face-to-face transactions at a consumer's residence, at the seller's transient quarters, or at a place other than the seller's regular place of business. If a sales transaction is initiated by a direct marketing solicitation, this rule clarifies that the entire transaction (contract, sale, billing and delivery) is covered. However, this rule also clarifies that the following transactions are not covered:

- Routine transactions at an established public market, such as a farmer's market.
- Telephone, mail or electronic communications initiated by the consumer (e.g., when you call for a plumber or pizza delivery), unless the contact is part of a direct marketing transaction initiated by the seller (e.g., a consumer's telephone response to a mail sweepstakes offer).

- The delivery, to the consumer's home, of goods or services purchased in a transaction other than a direct marketing transaction (e.g., the routine delivery of furniture or plumbing services).

This rule, like the current rule, requires sellers to make certain opening disclosures in direct marketing solicitations. Like the current rule, it also requires the seller to disclose the sale terms before the consumer makes any purchase commitment. In a mail or face-to-face transaction, the seller must make these disclosures in writing. In a telephone transaction, the seller may make the disclosures orally if the seller confirms in writing according to this rule.

Compared to 1972 (when ATCP 127 was originally adopted), far more sales transactions are conducted by telephone and credit card. The vast majority of these transactions are bona fide transactions. The telephone offers speed and convenience for consumers as well as sellers. This rule updates telephone solicitation rules, including disclosure and confirmation requirements, consistent with accepted business practices and new Federal Trade Commission rules. This rule strengthens, and does not weaken, the protections provided under the FTC rules.

### **Financial Institutions**

This rule does not apply to financial institutions other than credit unions. This does not reflect any effort to "favor" any segment of the financial industry. It merely reflects the scope of the department's jurisdiction under s. 93.01(1m), Stats. Under that statute, the department has regulatory jurisdiction over credit unions, but does not have jurisdiction over other financial institutions.

### **"Seller" Definition**

Under current rules, a "seller" includes suppliers or distributors who effectively control the seller, or who are subsidiaries or affiliates of the seller. The department believes that the new definition of "seller" is at least as broad as the current definition, and is more readily applicable to a variety of different marketing arrangements. The new rule broadly defines "seller" to include any person (individual or organization) who engaged in the business of selling, offering to sell, or promoting the sale of consumer goods or services to consumers. Under the new rule, a "seller" includes all the following:

- A person who accepts payment for a purported sale of consumer goods or services to a consumer.
- An employee or agent of a seller.

- A person who makes home solicitations under arrangement with a seller.

For example, a firm that sells or promotes the sale of consumer goods or services to consumers is a "seller" under the new rule. An independent telemarketing firm that makes telephone solicitations on behalf of that "seller" is also a "seller" under the new rule. Individual employees of the telemarketing firm are also "sellers," under the new rule, when making telephone solicitations to consumers.

### **Fictitious Names**

The proposed rule provisions related to fictitious names are based on FTC telemarketing rules. The rule does not mandate the use of actual names (because of safety and privacy concerns), but does ensure that the name disclosed to the consumer uniquely identifies the individual making the solicitation. An individual seller could conceivably use more than one fictitious name during his or her career. However, each of those names would be uniquely associated with that individual, and no other individual within the sales organization. The rule prohibits misrepresentations by sellers which have the tendency to confuse or mislead consumers, including the same individual posing as different persons holding different positions within an organization.

### **Loan Arrangers**

The proposed rule provisions related to loan arrangers are based on FTC telemarketing rules. The proposed rule provides much greater protection than current rules, which contain no provisions related to loan arrangers. The loan arranger problems which the department and the FTC have identified to date involve loan arrangers who take money from consumers after promising results. The rule addresses that problem. The department does not see a need, at this time, to intrude on other legitimate business transactions. Loan arrangers are also regulated by s. 943.62, Stats., and credit service organizations are extensively regulated by the Department of Financial Institutions under ss. 422.501-506, Stats.

### **Recordkeeping**

The issue of what constitutes a "substantially identical" record may have to be determined on a case-by-case basis, based on the particular records involved. If there is a serious difference of opinion between the department and the seller, a court may decide. In an investigation, the department can evaluate the completeness and accuracy of a seller's records by comparing those records to sales documents and testimony received from consumers and employees.

Honorable Gary George  
April 21, 1999  
Page 4

We believe the proposed Direct Marketing Rule will provide significant new protection for Wisconsin consumers, particularly since it brings within its scope the new methods of conducting commercial transactions by telephone or by electronic mail

Please contact me at 224-4920 if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "William L. Oemichen".

William L. Oemichen, Administrator  
Division of Trade & Consumer Protection



State of Wisconsin  
Tommy G. Thompson, Governor

## Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



May 6, 1999

To: The Honorable Sue Jeskewitz  
Assembly Committee on Consumer Affairs

From: William L. Oemichen, Administrator  
Division of Trade and Consumer Protection *Bill Oemichen*

Subject: Department of Agriculture, Trade and Consumer Protection testimony on  
proposed Chapter ATPC 127, Wisconsin Administrative Code

Thank you for the opportunity to present Chapter ATPC 127, Wisconsin Administrative Code, to the Assembly Committee on Consumer Affairs.

This rule revision is in response to natural changes that have occurred in the marketplace in recent years. It improves existing protection against fraudulent home solicitation schemes and adds new protection for direct marketing through mail and electronic means.

The Department has been regulating sales made away from a regular place of business since 1972. The current regulations are based on the principle that when a solicitation or transaction occurs away from a regular place of business, the consumer needs to know the product, price and other terms of the sale, who is soliciting them and how to contact the seller with questions or concerns about the transaction. This information must be documented and given to the consumer in a way that allows follow-up after the seller has left the place where the transaction occurred.

The current home solicitation selling rule served consumers well when solicitations were primarily face-to-face. However, in recent years the preferred method for businesses to solicit consumers has become mail or telephone. While the principle of providing information and documentation to the consumer remains unchanged, different methods for delivery of this information that are appropriate for mail, electronic, and telephone sales needed to be developed.

This rule is based, in part, on Federal Trade Commission telemarketing rules which took effect on December 31, 1995. However, this rule also protects consumers in other transactions, including direct mail and door-to-door transactions. It also goes beyond FTC telemarketing rules to cover intrastate transactions and new electronic sales methods, such as fax and e-mail.

This rule will provide more effective prevention, and more effective redress for consumers without hurting legitimate sellers. It will harmonize current state and federal requirements, and will update current rules to meet the demands of the "new marketplace."

The department developed this rule in consultation with interested parties including the Department of Justice, the Direct Marketing Association, the Wisconsin Consumer Protection Advisory Council, and other consumer and business groups. The department believes that there is broad consensus and support for this rule. The DATCP Board unanimously approved this final draft rule on February 23, 1999.

### **Senate Committee on Judiciary and Consumer Affairs Action**

The rule was reviewed at an Executive Session of the Senate Committee on Judiciary and Consumer Affairs on April 30, 1999. The Committee asked many questions which are answered in this paper and the attached letter. The only recommendation by Senator George is that the Department should consider exempting credit unions in addition to the other financial institutions which are already exempt from Department regulation under Chapter 93. The Department is willing to provide this exemption and has prepared language to amend the rule.

### **Rule Coverage**

Direct marketing includes telemarketing or other interactive voice communications, direct mail, fax, e-mail and face-to-face selling away from the seller's regular place of business.

This rule does not apply to:

- Mass advertisements which are not addressed to individual consumers
- Catalog sales.
- Transactions an established public market.
- Telephone, mail or electronic communications initiated by a consumer, unless prompted by the seller's direct marketing solicitation to the consumer.
- Mail solicitations that merely invite consumers to the seller's regular place of business.
- The delivery of goods or services which the consumer at a regular place of business.
- Persons who are not in the "business" of selling (such as occasional "garage sales").

### **Disclosure Requirements**

Under this rule, direct marketing solicitations must include certain opening disclosures. An individual making telephone or face-to-face solicitations must make these disclosures before making any statements other than an initial greeting.

A seller must also make additional disclosures before a consumer enters into a purchase contract, and before the seller takes the consumer's credit card number or accepts any payment from the consumer. In a mail or face-to-face transaction, the seller must make these disclosures in writing. In a telephone transaction, the seller may make the disclosures orally if the seller confirms in writing according to this rule.

### **Payment Authorization**

Under this rule, a home solicitation seller may not submit a negotiable instrument drawn on a consumer's account without that consumer's express, verifiable authorization. In a face-to-face transaction, the authorization must be in writing. In a telephone or mail transaction (where the consumer orders by phone), the authorization may include a tape recording or other verifiable authorization that complies with this rule. The standards for telephone authorizations are the same standards specified in the FTC telemarketing rules.

### **Prohibited Practices**

This rule generally prohibits false, deceptive or misleading representations in a home solicitation transaction. It specifically prohibits a number of common misrepresentations such as nature or cost of the product, identity of the seller, and contract conditions.

This rule prohibits threatening, intimidating or harassing a consumer, or failing to leave a consumer's premises upon request. It also prohibits a telemarketer initiating a telephone solicitation to a consumer before 8:00 AM or after 9:00 PM without prior consent, repeatedly causing a consumer's telephone to ring, or engaging a consumer in telephone conversation in order to annoy, abuse or harass the consumer. It prohibits initiating a telephone solicitation to a consumer who has previously stated that he or she does not wish to receive telephone solicitations from that seller.

This rule prohibits direct marketers from using prize promotions that violate s. 945.02(3), Stats. (lottery law) or s. 100.71, Stats. (prize notice law).

### **Recordkeeping**

This rule requires a direct marketer to keep records of transactions for at least 2 years. The rule establishes slightly different recordkeeping requirements for telephone, mail and face-to-face sellers.

Also attached to this testimony is a letter I sent to Senator George addressing specific questions which he had about the scope and requirements of the rule.

The department has invested significant effort to develop this rule and has responded to hearing comments from business and consumers alike. We believe we have addressed all of the concerns brought to our attention to the best of our ability and authority.

Thank you for the opportunity to present this important consumer protection rule to the committee.





State of Wisconsin  
Tommy G. Thompson, Governor

## Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



May 11, 1999

The Honorable Sue Jeskewitz, Chairperson  
Assembly Committee on Consumer Affairs  
P.O. Box 8952  
Madison, WI 53707-8952

*File*

### Re: Direct Marketing Rule

Dear Representative Jeskewitz:

I am responding to questions about a final draft DATCP rule related to direct marketing. *This rule strengthens and modernizes current rules under ch. ATCP 127.* The rule is supported by the Department of Justice, consumer groups and the affected business community.

### Jurisdiction

This rule expands the coverage of the current rules because it would apply to mail solicitations (including e-mail and fax solicitations). The current rule applies to face-to-face and telephone solicitations, but does not apply to mail solicitations. This rule, like the current rule, exempts general advertisements, catalog sales, and sales at a seller's regular place of business. (These exempt transactions are covered by other laws, such as the deceptive advertising law.)

This rule, like the current rule, applies to face-to-face transactions at a consumer's residence, at the seller's transient quarters, or at a place other than the seller's regular place of business. If a sales transaction is initiated by a direct marketing solicitation, this rule clarifies that the entire transaction (contract, sale, billing and delivery) is covered. However, this rule also clarifies that the following transactions are not covered:

- Routine transactions at an established public market, such as a farmer's market.
- Telephone, mail or electronic communications initiated by the consumer (e.g., when you call for a plumber or pizza delivery), unless the contact is part of a


direct marketing transaction initiated by the seller (e.g., a consumer's telephone response to a mail sweepstakes offer).

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This rule, like the current rule, requires sellers to make certain opening disclosures in direct marketing solicitations. Like the current rule, it also requires the seller to disclose the sale terms before the consumer makes any purchase commitment. In a mail or face-to-face transaction, the seller must make these disclosures in writing. In a telephone transaction, the seller may make the disclosures orally if the seller confirms in writing according to this rule.

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- A person who accepts payment for a purported sale of consumer goods or services to a consumer.

- An employee or agent of a seller.
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For example, a firm that sells or promotes the sale of consumer goods or services to consumers is a "seller" under the new rule. An independent telemarketing firm that makes telephone solicitations on behalf of that "seller" is also a "seller" under the new rule. Individual employees of the telemarketing firm are also "sellers," under the new rule, when making telephone solicitations to consumers.

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Honorable Sue Jeskewitz

May 11, 1999

Page 4

accuracy of a seller's records by comparing those records to sales documents and testimony received from consumers and employees.

We believe the proposed Direct Marketing Rule will provide significant new protection for Wisconsin consumers, particularly since it brings within its scope the new methods of conducting commercial transactions by telephone or by electronic mail.

Please contact me at 224-4920 if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "William L. Oemichen".

William L. Oemichen, Administrator  
Division of Trade & Consumer Protection

STATE OF WISCONSIN  
IN THE ASSEMBLY  
COMMITTEE ON CONSUMER AFFAIRS

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Assembly Clearinghouse Rule 98-117

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JOHN C. BUELLESBACH,  
AND ALL WISCONSIN CONSUMERS,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION,

Defendant.

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MOTION TO OPPOSE DEPARTMENT'S PROPOSAL TO  
REPEAL AND RE-CREATE WIS. ADMIN. CODE CHAPTER ATP 127

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What were advertised by the Department as "tough new rules which would apply to telephone, mail and electronic e-mail solicitations" are neither new nor tough. The rule proposed by the Department significantly limits the coverage of chapter ATP 127. It looks at only half the transaction (solicitation) and includes additional unjustifiable exclusions (e.g. newspaper, public market, casual seller, internet home page). Furthermore, added protections offered consumers under the proposed rule are illusory. They are unenforceable, possibly invalid (commerce clause), redundant, and lack meaningful penalty provisions. Overall, the proposed rule is a bad deal for Wisconsin Consumers.



## Background

Wisconsin Administrative Code chapter ATCP 127, the Home Solicitation Selling rule, works in conjunction with the Right to Cancel<sup>1</sup> to protect the public from unscrupulous sellers who take advantage of customers by illegal or sharp practices. The Right to Cancel, which is part of the Wisconsin Consumer Act, protects against high pressure sales tactics. The Home Solicitation Selling rule is principally directed at unfair and deceptive practices used by direct sellers. It was adopted because previous regulations, such as the Right to Cancel, were easily evaded.<sup>2</sup> Whereas the Right to Cancel applies to transactions both solicited *and* consummated away from a seller's regular place of business, the Home Solicitation Selling rule applies to transactions either solicited *or* consummated away from a seller's regular place of business.

There are several reasons why consumer transactions that occur away from a seller's regular place of business receive greater scrutiny. The buyer is at a disadvantage because goods are often not available for inspection prior to sale. There is a need to protect consumers from transient (door-to-door) sellers. There is a desire to protect consumers from high pressure and deceptive sales tactics. The dissemination of personal information and certain selling techniques ignore the consumer's right to privacy. For these reasons, and because of the historically high number of complaints, direct sellers are held to a slightly higher standard that requires full disclosure and prohibits misrepresentation.

The current rule focuses only on where a particular transaction occurs.<sup>3</sup> This provides a clearly identifiable objective standard that avoids subjective considerations such as whether a particular seller should be regulated or whether a particular consumer is deserving of protection. The added benefit is that the current rule adapts very well to new direct marketing practices and changing technology. Based on recent newspaper articles, the Home Solicitation Selling rule, which became effective on February 1, 1973, remains a powerful tool in the ongoing battle against deceit and deception in the marketplace.<sup>4</sup>

## Analysis

The proposed rule appears to focus on the method of delivery (telephone, mail, face-to-face) instead of the message (full disclosure, no misrepresentation). It is considerably longer and less flexible than the current rule. Unjustifiable exclusions limit coverage and, coupled with problems of proof, make it more difficult for consumers to recover under the rule. The Department appears more concerned with shielding local merchants than protecting Wisconsin consumers.

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<sup>1</sup> Wis. Stats. ch. 423, sub.II.

<sup>2</sup> Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 Marq. L. Rev. 559, 590 (1974).

<sup>3</sup> The Home Solicitation Selling rule, together with the Right to Cancel and Wis. Stats. § 100.18 (false advertising), provide Wisconsin consumers with three levels of protection (*see* Appendix). It is an intelligent approach to consumer protection.

<sup>4</sup> *State finds 229 violations by magazine subscription firm*, Milwaukee Journal Sentinel, April 28, 1999, at 1A; *Seller denies blame in eBay mix-up*, Milwaukee Journal Sentinel, March 3, 1999, at 1D; *Wedding photographer told to pay up*, Milwaukee Journal Sentinel, Sept. 19, 1998, at 1A.

### Coverage

The current rule specifically covers transactions consummated away from a seller's regular place of business regardless of how or where they were solicited. The proposed rule does not. The Department claims this is a matter of interpretation. The proposed rule defines "solicitation" broadly enough to encompass most transactions covered by the current rule. If that is the case, why discard a standard that has worked well for 26 years?

This is really an issue of proof. The advantage of the current rule becomes very obvious when trying to establish a violation of chapter 127. Solicitation is often confused with who makes the initial contact. For example, in *Reusch v. Roob*,<sup>5</sup> defendant argued that he did not solicit the business because plaintiff initiated contact. Therefore, the Home Solicitation Selling rule should not apply. For the judge, the decision was simple: Where was the contract signed? The contract was signed at Roob's residence. Roob's residence was not a regular place of business. Therefore, the Home Solicitation Selling rule applied.

### Exclusions

Beyond jurisdictional exclusions, the current rule excludes general advertising, catalog sales and mail solicitations. The proposed rule excludes mass advertising, catalog sales, newspaper subscriptions, public markets, casual sales and internet home pages. Each exclusion reduces the effectiveness of the rule and invites arguments that others in similar circumstances should be exempt.

General advertising does not target an individual or group and is viewed solely at the discretion of the consumer. In addition, representations made in general advertising can be easily verified. Catalogs typically require a substantial investment to produce and distribute. Hopefully, this commitment is an indication that the seller will treat customers fairly. These exclusions are justifiable.

Proposed rule excludes newspaper subscriptions that may be canceled at any time without penalty. ATCP § 127.01(3)(d) (final draft, 03/10/99). Can any seller escape the Home Solicitation Selling rule by claiming they allow customers to cancel at any time without penalty? Why the special treatment for newspapers?

Proposed rule excludes transactions at an established public market. ATCP § 127.01(22)(d) (final draft, 03/10/99). Exhibitors at established public markets, whether a farmer's market or a regularly scheduled swap meet, are nothing more than transient sellers. There is no commitment or accountability. These sellers are free to offer goods for sale when and if they choose. For good reason, neither the Wisconsin Consumer Act nor the current rule exempt transactions at an established public market. Why the exclusion? A scam is a scam whether it involves sweet corn, autographed sports memorabilia or weight loss pills.

Proposed and current rule exclude casual sales. ATCP § 127.01(21) (final draft, 03/10/99). In a casual sale, there is no incentive for the seller to treat a customer fairly. The need to cover casual sales is best illustrated by the sports memorabilia craze. Suppose you purchase a Brett Favre autographed jersey offered through a classified ad. You later find out that the autograph was forged by the seller. Should this deception be tolerated because the seller was not in the business of selling sports memorabilia?

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<sup>5</sup> No. 97SC002949 (Mil. County 1998)(Ct. App. No. 98-3102).

Proposed rule excludes internet home pages. ATCP § 127.01(13) (final draft, 03/10/99). The Department equates internet home pages with general advertising. An internet home page is much more like a transient seller. With the click of a mouse button, a seller can transform what appeared to be a California company selling designer handbags into a New York company selling weight loss pills. Unlike general advertising, electronic commerce allows an internet home page to collect money. Chapter ATCP 127 offers an appropriate means to protect consumers engaged in electronic commerce.

### **Protections**

Proposed rule adds restrictions on telemarketers. Unfortunately for consumers, the protections are, for the most part, illusory. They are unenforceable because consumers have no access to telephone usage records showing incoming calls. Without these records, it is virtually impossible to prove a violation of any telemarketing rule. The added protections lack meaningful penalty provisions. Even if you could prove that a telephone solicitor called five times during dinner, what are your damages? Double of nothing is still nothing. Finally, the added protections offered by the proposed rule are redundant. If the problems are with out-of-state telemarketers as the Department suggests, then consumers are already covered by the federal Telemarketing Sales Rule. For example, the proposed rule requires the seller to have "verifiable authorization" before taking money from a customer's account. This is identical to language in the Telemarketing Sales Rule.

Proposed rule covers mail solicitations. Unlike general advertising, direct mail targets individuals and groups. The recipient must examine the piece of mail even if just to discard it. Unfortunately, the proposed rule excludes written communications that invite a consumer to the seller's regular place of business. ATCP § 127.01(22)(c) (final draft, 03/10/99). This allows unscrupulous local merchants to lure potential customers to a regular place of business using deceit and deception. The Department response: "Local stores generally treat consumers fairly because they have reputations to uphold. Problems are more likely to occur with out-of-state telemarketers, internet marketers, and door-to-door salespeople who may disappear after getting the customer's credit card number." This statement opens the door for an out-of-state seller (*e.g.* Publishers Clearing House) to argue that the mail solicitation provisions are invalid because they unfairly protect Wisconsin merchants in violation of the commerce clause. *See e.g., Dean Foods Co. v. Brancel*, 22 F.Supp. 2d 931 (W.D.Wis. 1998).

### **Additional Concerns**

Current rule specifically prohibits a seller from making "any statement or representations inconsistent with or contradictory to any contract document or instrument in writing evidencing the transaction."<sup>6</sup> This provision is significant because it renders the knowledge and intent of the seller irrelevant, making it easier to prove a violation of the rule. Proposed rule does not include this provision.

Proposed rule allows sellers to use fictitious names. The Department justifies this as a means of protecting the privacy of individuals employed to make solicitations on behalf of a seller. What about the privacy of the consumer?! Misrepresentation can never be

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<sup>6</sup> Wis. Admin. Code § 127.03(5).



justified. This provision just adds another barrier making it more difficult for consumers to recover under the rule.

Proposed rule makes knowledge a requirement for assisting violations. This unfairly puts the burden on the consumer. Knowledge is very difficult to prove. Those who distribute personal information have an obligation to make sure that the information is not misused. Aggrieved consumers should only be required to identify the provider.

Proposed rule should be consistent with enabling statute and the Wisconsin Consumer Act. Replace "monetary loss" with "pecuniary loss" in accordance with Wis. Stats. § 100.20(5). Replace "seller's regular place of business" with "regular place of business of the merchant" so the language is consistent with Wis. Stats. § 423.201. Include the following statement of purpose and rules of construction: "This chapter shall be liberally construed and applied to protect consumers."

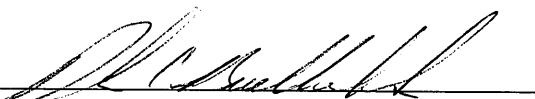
### **Suggestions**

Why abandon a rule that has worked well for 26 years and continues to be effective? If it's not broken, don't fix it. For all consumers in Wisconsin, please strongly recommend that the Department not repeal and re-create chapter 127. Any revision that the Department contemplates must:

1. like the current rule, apply to any transaction either solicited or consummated away from seller's regular place of business;
2. be short and simple (easy to understand and apply);
3. include few exceptions (general advertising, catalog sales);
4. focus on message (full disclosure, no misrepresentation) – not method (telephone, mail, face-to-face);
5. be consistent with the enabling statute (Wis. Stats. § 100.20) and the Wisconsin Consumer Act (Wis. Stats. chs. 421 to 427).

Respectfully submitted this 6<sup>th</sup> day of May, 1999.

By:



John C. Buellesbach  
3026 S. Moorland Road  
New Berlin, WI 53151  
(414) 938-9270

**APPENDIX**  
**Assembly Clearinghouse Rule 98-117**  
**Index**

Wisconsin Administrative Code chapter ATCP 127 (Home Solicitation Selling)

Three Levels of Protection for Consumers in Wisconsin

*State finds 229 violations by magazine subscription firm,*  
Milwaukee Journal Sentinel, April 28, 1999, at 1A.

*Seller denies blame in eBay mix-up,*  
Milwaukee Journal Sentinel, March 3, 1999, at 1D.

*Wedding photographer told to pay up,*  
Milwaukee Journal Sentinel, Sept. 19, 1998, at 1A.

*Couple settle suit against telemarketers,*  
Milwaukee Journal Sentinel, April 23, 1999, at 2B.

*Ex-sports shop owner gets probation for faked autographs,*  
Milwaukee Journal Sentinel, May 1, 1999, at 1B.

## Chapter ATCP 127

### HOME SOLICITATION SELLING

ATCP 127.01 Definitions  
ATCP 127.02 Disclosure obligations; contract requirements

ATCP 127.03 Prohibited practices  
ATCP 127.04 Unfair employment offers

Note: Chapter Ag 127 was renumbered chapter ATCP 127 under s. 13.93 (2m) (b) 1, Stats., Register, April, 1993, No. 448.

Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20 (6), 100.26 (3) or (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees.

**ATCP 127.01 Definitions.** (1) "Home solicitation selling" means the selling or leasing, or the offering for sale or lease, of goods or services primarily for personal, family, or household purposes, including courses of instruction or training, where the sale, lease, or offer thereof is either personally solicited or consummated by a seller at the residence or place of business or employment of the buyer, at a seller's transient quarters, or away from seller's regular place of business. Personal solicitation includes solicitation made directly or indirectly by telephone, person-to-person contact, or by written or printed communication other than general advertising indicating a clear intent to sell goods or services at a regular place of business, and other than catalog or mail solicitation not accompanied by any other solicitation. Transient quarters includes hotel or motel rooms, or any other place utilized as a temporary business location.

(2) "Buyer" means both actual and prospective purchasers or lessees of any goods or services offered through home solicitation selling.

(3) "Seller" means a person or organization engaged in home solicitation selling or the making of home solicitation sales, or advertising, offering or dealing in goods or services for the purpose of home solicitation selling, or providing or exercising supervision, direction, or control over sales practices used in home solicitation sales, but does not include banks, savings and loan associations, insurance companies and public utilities to the extent exempt from department regulation under s. 93.01 (13), Stats., or licensed real estate brokers or sellers with respect to real estate listings or the sale or leasing of real estate, or incidental sales made by persons not regularly engaged in the business of selling goods or services. The term includes sales representatives, employees, or agents of a seller, however designated by the seller. It also includes a supplier or distributor of goods and services to a seller if:

(a) The seller is a subsidiary or affiliate of the supplier or distributor.

(b) The seller interchanges personnel or maintains common or overlapping officers or directors with the supplier or distributor; or

(c) The supplier or distributor provides or exercises supervision, direction or control over the selling practices of the seller.

(4) "Home solicitation sale" or "sale" means a sale or lease resulting from home solicitation selling as defined in sub. (1).

History: Cr. Register, September, 1972, No. 201, eff. 10-1-72; emerg. am. (1) eff. 10-2-72; am. (1) and (3) intro. par., Register, January, 1973, No. 205, eff. 2-1-73; am. (3) (intro.), Register, March, 1976, No. 243, eff. 4-1-76; correction in (3) made under s. 13.93 (2m) (b) 5, Stats., Register, April, 1993, No. 448.

**ATCP 127.02 Disclosure obligations; contract requirements.** (1) In a home solicitation sale every seller shall, at the time of initial contact or communication with the buyer, clearly and expressly disclose: the seller's individual name, the name of the business firm or organization he or she represents, and the identity or kind of goods or services he or she offers to sell. When the initial contact is made person-to-person or through other oral communications, such disclosure shall be made before asking any questions or making any statements other than an initial greeting.

(2) In a home solicitation sale, before any sale is consummated or any contract signed, the seller shall fully disclose to the buyer the total price to be paid, less trade-ins or allowances, for any goods or services sold or to be sold, including credit or finance charges other than those made pursuant to prior existing open-end credit arrangements, and all other terms and conditions of sale affecting the buyer's obligation for payment. In credit transactions other than those made pursuant to prior existing open-end credit plans, the seller shall furnish to the buyer prior to the time first payment is due, a true copy of any agreement signed by the buyer evidencing the transaction showing the individual name of the person making the sale, and the name, mailing address and telephone number of the person or firm whom the seller represents. In cash transactions, the seller shall furnish the buyer, at or prior to the time payment is made, a sales slip or other document evidencing the transaction showing the date of sale, a description of the property or services sold, the total price paid or to be paid less trade-ins or allowances, the individual name of the person making the sale, and the name, mailing address and telephone number of the person or firm whom the seller represents. If a language other than English is principally used in making the sale, all sales documents or agreements must be both in English and in the language principally used.

History: Cr. Register, September, 1972, No. 201, eff. 10-1-72; emerg. r. (3) eff. 10-2-72; am. (1), (2) and r. (3), Register, January, 1973, No. 205, eff. 2-1-73; correction in (1) made under s. 13.93 (2m) (b) 5, Stats., Register, April, 1993, No. 448.

## ATCP 127.03

**ATCP 127.03 Prohibited practices.** (1) No seller engaged in making a home solicitation sale shall represent directly or by implication that the seller:

(a) Is making an offer to specially selected persons or that the buyer or prospective buyer has been specially selected, unless such representations are true and the specific basis on which such representations are made is concurrently disclosed to the prospective buyer.

(b) Is conducting a survey, test or research project, or engaged in a contest or other venture to win a cash award, scholarship, vacation or similar prize, when in fact the principal objective is to make a sale or lease or to obtain information to help identify sales prospects.

(c) Is conducting a special sales promotion campaign or making a special offer limited to a few persons only or for a limited period of time, or is authorized to place the product or service in a few homes, unless the representations are true and the specific basis on which such representations are made is concurrently disclosed to the prospective buyer.

(d) Will give any product or service free or as a gift or without cost or charge, or at a nominal cost or charge, if the furnishing of such product or service is contingent on the making of any payment or purchase of any other product or service. Other terms, conditions and obligations upon which receipt and retention of any gift or free item are contingent shall be fully and clearly disclosed in connection with the offer of any gift or free item. This does not prohibit the making of combination offers where the purchase of one item at a reduced price is contingent upon the purchase of other items at a regular price, provided the terms and conditions of the offer are fully disclosed to the buyer, the buyer is informed of the total price the buyer must pay and the price of items included in the offer are based on the price at which such items are regularly sold by the seller.

(e) Will provide any service purchased for a longer period than the seller is obligated to provide under the contract.

(f) Will in any way reduce the regular price for the goods or services to the buyer for the use of the buyer's name or a written expression of his or her opinion.

(2) No seller engaged in making a home solicitation sale shall misrepresent, directly or by implication:

(a) The identity of the seller, the business firm or organization the seller represents, or affiliation or association with other firms, businesses or governmental entities, or the identity of the goods or services the seller offers to sell.

(b) The savings which will be accorded or made available to the buyer.

(c) The length of the sales presentation.

(d) The delivery or performance date.

(e) The nature of any document the buyer is requested or required to execute in connection with the purchase or lease of any goods or services.

(f) Any limitations and restrictions on the guarantee or warranty made by the seller, including any duty which the buyer must perform as a condition precedent to the guarantee or warranty becoming effective.

(g) Finance or interest charges or installments to be paid in connection with sales made on credit, or any other terms or conditions under which credit will be extended.

(3) No seller engaged in making a home solicitation sale shall use any false, deceptive or misleading representations to induce a sale, or use any plan, scheme or ruse which misrepresents the true status or mission of the person making the call, or fails to promptly leave the premises at which a sales presentation is made when requested to do so.

(4) No seller engaged in making a home solicitation sale shall make any material representations with respect to the warranty or guarantee of the product or services he or she sells unless such representations are true and are furnished to the buyer in writing as part of any sales document or agreement, or in a separate statement of warranty or guarantee. Separate statements of warranty or guarantee shall be furnished to the buyer prior to the time first payment is due.

(5) No seller engaged in making a home solicitation sale shall make any statement or representations inconsistent with or contradictory to any contract document or instrument in writing evidencing the transaction.

History: Cr. Register, September, 1972, No. 201, eff. 10-1-72; emerg. am. (1) (d) and (e), eff. 10-2-72; am. (1) (a), (c), (d) and r. (e); renum. (1) (f) and (g) to be (e) and (f); cr. (2) (g); am. (4) and cr. (5), Register, January, 1973, No. 205, eff. 2-1-73; am. (1) (intro.) and (b), (2) (intro.), (3), (4) and (5), Register, March, 1976, No. 243, eff. 4-1-76; corrections made under s. 13.93 (2m) (b) 5, Stats., Register, April, 1993, No. 448.

**ATCP 127.04 Unfair employment offers.** No seller shall represent in any offer of employment, including offers made in training sessions or advertisements, that prospective representatives, agents or sellers will be paid on a salary basis if they accept employment when, in fact, they will be paid on a commission basis.

History: Cr. Register, September, 1972, No. 201, eff. 10-1-72; emerg. renum. Ag 127.05 to be Ag 127.04, eff. 10-2-72; renum. Ag 127.05 to be Ag 127.04, Register, January, 1973, No. 205, eff. 2-1-73; correction made under s. 13.93 (2m) (b) 5, Stats., Register, April, 1993, No. 448.

## THREE LEVELS OF PROTECTION FOR CONSUMERS IN WISCONSIN

Transactions wholly solicited and consummated at seller's regular place of business	Transactions either solicited or consummated away from seller's regular place of business	Transactions both solicited and consummated away from seller's regular place of business
<b>False Advertising Statute</b> Wis. Stats. § 100.18	<b>Home Solicitation Selling Rule</b> Wis. Admin. Code ch. ATCP 127	<b>Wisconsin Consumer Act</b> Wis. Stats. chs. 421 to 427
Requires conspicuous sign that clearly states name of association, corporation or individual doing business.	<p>Seller must initially disclose name, and name of any business or organization that seller represents.</p> <p>Seller must fully disclose total price and all other terms and conditions before sale consummated or contract signed.</p> <p>Prohibits representations that are false, deceptive or misleading.</p> <p>Prohibits representations that are inconsistent with any written document evidencing the transaction.</p>	<p>Seller must initially disclose name, and name of any business or organization that seller represents.</p> <p>Seller must fully disclose total price and all other terms and conditions before sale consummated or contract signed.</p> <p>Prohibits representations that are false, deceptive or misleading.</p> <p>Prohibits representations that are inconsistent with any written document evidencing the transaction.</p>
Prohibits representations that are untrue, deceptive or misleading.		<p>Buyer has right to cancel for any reason within 3 business days.</p> <p>Seller must provide buyer with notice of right to cancel.</p>

# Couple settle suit against telemarketers

**They say no attorney would take their case, which alleged that AT&T and credit card company made excessive calls**

By DAVID COLE  
Special to the Journal/Sentinel

Kenosha — The Kenosha couple who made headlines in January when they filed a lawsuit against AT&T over the company's telemarketing practices, have settled out of court after they couldn't find an attorney to take their case.

Neal and Sonya Rhutasel claimed that AT&T telemarketers violated federal law by making repeated calls to them after they had asked not to be bothered. They were seeking \$10,500

in damages in Kenosha County small claims court. State officials said the suit was the first of its kind in Wisconsin.

But after contacting 10 attorneys over the last three months, the couple couldn't find anyone to represent them and decided to settle for an undisclosed amount.

"Nobody would take the case," Sonya Rhutasel said Thursday. "I wish we could've followed it through."

Still, Rhutasel said, she and her husband believe they made their point, and haven't been

unduly bothered by phone salesmen since they filed the suit.

An AT&T spokesman had said that some of the calls were made by representatives of AT&T Universal, an unaffiliated credit card company.

Because of the "David and Goliath" aspect of the case and because the amount of damages sought was so small, no attorney would take the case, she said.

They settled out of court two weeks ago with AT&T and AT&T Universal, which eventually was brought into the case, rather than spend more time and money researching the case in preparation for trial on their own. "It got to be very frustrating," she said.

The terms of the settlement prohibit the couple from discussing it, she said.

The Rhutasels said they began receiving calls in August, after the couple compared long-distance services, dropped AT&T and signed up with another company. They claim that an AT&T telemarketer called the next day, and Sonya Rhutasel asked the company to stop calling.

In response to their request to be placed on the company's no-call list, the couple were told the process could take up to 90 days. And from Aug. 9 to Oct. 12, they allege, they received seven more calls from representatives of AT&T marketing entities.

State consumer protection of-

ficials say they are receiving a growing number of telemarketing complaints.

Telemarketing ranked eighth on the list of complaints received by the state Department of Agriculture, Trade and Consumer Protection in 1998, said Bill Oemichen, administrator of the department. That marked the first time telemarketing made the top 10 list, he said.

In response, the department formulated new rules that require a number of up-front disclosures from telemarketers, including the identity of their employer, what services or products they're selling and, if a sale is made, a phone number the customer can call in the event of a problem.

# State finds 229 violations by magazine subscription firm

Consumer law infractions, referred to Justice officials, carry \$2 million in penalties

By JIM STRINGER  
of the Journal Sentinel staff

State investigators have tied 229 consumer law violations to a

magazine-selling company that employed the victims of a fatal van crash near Janesville.

The infractions carry maximum penalties exceeding \$2 million.

Among the findings announced Tuesday in an investigation of Subscriptions Plus Inc. by the state Department of Agriculture, Trade and Consumer

Protection are:

- Door-to-door sellers for Subscriptions Plus routinely failed to tell potential customers in Wisconsin their names and company name.

- The firm's sellers got a foot in the door by improperly saying they were involved in a sales contest, and they failed to provide buyers information on their

right to cancel the order within three days.

The findings were turned over Tuesday to the Wisconsin Department of Justice, which will decide whether to proceed with civil or criminal prosecution. An injunction against the company also was requested by the consumer protection department.

"We would like to see this

company barred from ever doing business in Wisconsin again," said state trade and consumer protection administrator Bill Oemichen.

"I think it's fair to say there will be additional violations we will refer over to the Department of Justice," Oemichen

Please see VIOLATIONS page 7

MILWAUKEE JOURNAL SENTINEL WEDNESDAY, APRIL 28, 1999 7A

From page 1

said. "That's the aspect primarily of how were these young people recruited and were there misrepresentations made to get them to work for this company."

Jim Haney, a spokesman for the Department of Justice, said the referral by the consumer investigators would be reviewed promptly.

"Our own investigation is ongoing. It is a broad inquiry into any violations of Wisconsin law that the company may have committed," Haney said.

The Department of Workforce Development also is continuing an investigation into the company's labor practices, including the employment of minors and minimum-wage violations.

Oemichen said that if charges come, they likely would be filed against both Subscriptions Plus, an Oklahoma-based company, and an Iowa subsidiary known as YES, plus their owners.

The companies could not be reached for comment Tuesday.

Oemichen said Karleen Hillery, who heads Subscriptions Plus, and her ex-husband, Choan Lane, have been difficult to find.

In March, seven people were killed and five were seriously injured when the van they were in rolled over on Interstate 90 in Rock County. The driver, Jeremy Holmes, 20, pleaded guilty earlier this month to vehicular homicide and injury.

He had no driver's license; the crash occurred as he tried to switch seats with another worker in the van after spotting a police officer.

## Working Conditions

The tragedy brought the glare of scrutiny on Subscriptions Plus and Yes that employed the young sellers working here, including some from Wisconsin.

Oemichen said the workers involved in the accident plus others on two additional crews — approximately two dozen in all — were selling in La Crosse, Madison, Oshkosh, Appleton, Whitewater and other communities, concentrating on college campus areas. After the crash, the other workers quickly relocated to the Baltimore area, he said.

Sellers work on commission and pay for some of their expenses as they travel around. The investigation found that the company required them to sleep three or four to a motel room, with the person who had the slowest sales sleeping on the floor that night, Oemichen said. Sometimes, when workers were detained by police for various violations, the rest of the crew would leave them behind and move to another city, he said.

State investigator Mike Tuten interviewed four workers who were injured in the crash and pieced together information about how the company does business. Not all of the workers have soured on the firm, despite what happened.

"At least one of the injured people has already rejoined the crew," Tuten said.

He was able to determine that on 102 occasions, the workers violated a state home solicitation rule requiring them to identify themselves and the company they work for when they approach a customer. Those same 102 times, they softened the customer by talking about a sales contest before mentioning that

they were selling magazines, which also is a rule violation.

The maximum civil penalty for each of these violations is \$10,000.

The state also found 25 violations of a statute requiring door-to-door sellers to provide customers with two copies of a notice that says they have three business days to cancel the deal. Each of these violations carries a top forfeiture of \$5,000.

Jail time could be added to the penalties if the attorney general decides to pursue criminal action against the company, Oemichen said.

# Seller denies blame in eBay mix-up

Internet breakdown led  
to auction problems,  
Mequon woman says

By JOEL DRESANG  
of the Journal Sentinel staff

A Mequon woman blamed for being a culprit in an eBay online auction snafu said Tuesday she's really a victim, as state regulators reminded consumers of the murky bazaar of e-commerce.

Maura M. Werts has given refunds to six of the 33 consumers who complained that she hadn't delivered the collectibles they bid for through the embattled eBay Internet auction house.

Werts blamed interrupted

service from America Online for causing her to lose her computer records on who had agreed to pay how much for several items — collectible plates, a teapot, a pin — she had auctioned off through eBay.

"I had no idea who they were anymore," Werts said of the bidders. People sent money without identifying what they were buying, she said.

"I was just doing it for fun," Werts said, adding that she has had no problems buying items through eBay.

Werts also has agreed to stipulations made by the Wisconsin Department of Agriculture, Trade and Consumer Protection on any further selling she does online.

Hers is one of dozens of cases the state is investigating as complaints mount over the mishandling of online deals, in which consumers can fall prey to misrepresented identities and intentions.

It's also the latest incident for eBay, which, despite measures to protect users of the service, announced last week that the federal government was investigating possibly illegal transactions linked to its Web site.

"Department investigators have notified eBay that it may be held responsible under Wisconsin consumer protection law for fraud occurring through its online auction

*Please see AUCTION page 8*

## Auction/Seller blames Internet problem

From page 1

service," said consumer protection administrator Bill Oemichen.

Oemichen said his office is in daily contact with eBay, the king of online auctioneers, to insist that sellers known to be committing fraud are kicked off the

site.

"We're out there. We're monitoring Internet transactions," said Elmer Prenzlou, Milwaukee regional manager for the consumer agency, who investigated complaints against Werts.

By e-mail, Prenzlou contacted all 33 of the bidders who complained to eBay about Werts. Six responded to request refunds. All were for less than \$100.

Werts has agreed to stipulations from the state that any further selling she does online will be accompanied by disclosures that include the consumer protection agency's toll-free complaint hotline. The department also requires her to designate delivery times for whatever she sells and to refund purchases she doesn't deliver on time.

Werts said she had no plans to sell on the Internet again any time soon.



# Wedding photographer told to pay up

Judge calls actions 'unconscionable,' awards couple negatives of photos, plus damages and attorney fees

BY LISA SINK  
of the Journal Sentinel staff

Wedding photographer Mark Roob, accused of strong-arming newlyweds into buying more wedding pictures than they wanted, has lost a legal battle with a Pewaukee couple and

must surrender negatives that a judge said Roob held hostage for two years.

Calling Roob's actions "unconscionable," Milwaukee County Circuit Judge Michael Malmstadt ordered Roob to release Duane and Laura Reusch's prized wedding photos and pay

\$4,910 in damages and more than \$13,000 in attorneys fees.

Malmstadt ruled that Roob, 46, had violated several state consumer protection and fair trade laws in his dealings with the Reuschs, who sued him in small claims court.

"The evidence shows that Roob used such 'high pressure' sales tactics" to pit Laura and Duane Reusch against one an-

Please see WEDDING page 6

6A SATURDAY, SEPTEMBER 19, 1998 MILWAUKEE JOURNAL SENTINEL ED 3

## Wedding/Judge criticizes tactics of photographer

From page 1

other during a nearly six-hour meeting in November 1996 and persuade them to buy a \$5,100 album instead of the \$2,400 album they originally sought, Malmstadt wrote in a decision issued Thursday.

The couple signed a contract for the larger album, but the next day they tried to cancel the order. Roob refused to rescind the deal. Malmstadt said that was another violation of state consumer protection laws.

"This court finds that the defendant's actions of holding the initial order of 80 wedding pictures hostage in an effort to enforce his claim for payment for the additional photographs is unconscionable," Malmstadt wrote.

Roob, who works at a studio in Brookfield and in his Wauwatosa home, is fighting criminal charges filed against him in Waukesha County. In that case, a New Berlin couple have accused Roob of pressuring them to pay \$1,000 more for photos than they originally had agreed to buy.

A trial is scheduled for Dec. 8. The state Consumer Protection Division also has filed a complaint against Roob, alleging that he has engaged in a pat-

tern of unfair trade practices and needs to changes his business policies.

### Relief, Elation

The Reuschs said they were elated with Malmstadt's ruling and hoped it would prevent Roob from taking advantage of other couples.

"We are just absolutely thrilled," Laura Reusch said. "Our wedding was such a great day, but it had this dark cloud sitting over it for two years. You just want your pictures."

Her mother, Karen Newton, said that since the couple filed the small claims lawsuit, her family has heard from many other former customers of Roob who described high-pressure, bullying sales tactics.

"He had a really fine-tuned system," Newton said. "We hope that no other couples will have to go through the manipulation and just the meanness."

Roob said he would likely appeal and declined to comment.

His attorney, Jeffrey Jensen, expressed disappointment at the judge's ruling.

"I thought that we had a solid legal argument," Jensen said.

He said that Roob did not turn over the negatives because they were his copyrighted property.

"We believe that his conduct did comply with the law," Jen-

sen said. "His intention never was to ruin people's weddings."

Roob has said that he asked all wedding photography customers to meet with him after their wedding for what he called a "design session." At the meeting, he helped clients lay out their album, picture by picture.

Roob has said he suggested to newlyweds his idea of a good wedding album and encouraged — but never coerced — them to buy larger albums.

Chief among his suggestions is that couples pay for an album that has a proper artistic "flow" of wedding images, in which each two-page layout — what Roob called a "sequential view" — has a theme.

"I do exquisite work," he said after being charged in June. "I'm a professional's professional. But I have some people who love me and some who hate me."

Customers who complained to state and local authorities said Roob wanted them to purchase almost every photograph taken and grew angry if they tried to withdraw any, saying their wedding story was being ruined.

"He is a wonderful artist," Newton said. That "the money came in front of that artistry and his clients just kind of blew our minds."

# Ex-sports shop owner gets probation for faked autographs

Mequon store now closed;  
Favre helped in sting

By CHRIS CARR  
of the Journal Sentinel staff

A shaken and remorseful Ronald Marth, the former owner of the now-closed Mr. Sports memorabilia shop in Mequon, was sentenced Friday to four years of probation for selling at least 1,000 fake Brett Favre autographs.

The lack of jail time was a relief to Marth, 54, who had pleaded guilty a year ago to one count of fraud in exchange for a recommendation from prosecutors that he be sentenced to one

year in prison. "I'm sorry I made a mistake," a desperate Marth read in a statement before the sentencing. "I'll remember those words for the rest of my life. In my 54 years, I've never gotten anything more than a speeding ticket."

"At this point, the most important part of my life is my 11-year-old daughter. She'd be heartbroken if I had to go away for any period of time."

Before the sentencing, Marth's lawyer, Stephen Kravitz, painted a picture of an honest, cooperative and charitable man who became caught up in temp-

"In my 54 years,  
I've never gotten  
anything more  
than a speeding  
ticket."

Ronald Marth



tation and was the target of an unfairly executed FBI sting.

"This case, more than any other in my 10 years, cries out for a probation sentence," Kravitz told U.S. District Judge Rudolph Randa.

Assistant U.S. Attorney Stephen Biskupic, arguing for a re-

duced prison term of six months, said the losses Marth caused countless people to suffer should warrant jail time.

Along with the probation, Marth also was ordered to serve 800 hours of community service and reimburse those financially hurt by the selling of the fabricated merchandise. That could cost him between \$20,000 and \$30,000, according to estimates given in court.

Rex Valenti, a second person charged in the fraud scheme, who signed the fake signatures Marth sold, was sentenced in August to a 60-day prison term, or a three-year probation term, or-

Please see **FAKES** page 4

## Fakes/Merchant gets probation

From page 1

dered to serve 40 hours of community service and fined \$5,000.

Authorities said one reason for the difference in the two sentences was personal background.

Valenti, who was 27 when he was sentenced by Federal Judge Charles Clevert, had tested positive for marijuana and had sent the FBI an "inappropriate" letter, Clevert noted.

Marth was caught in his scam when an FBI sting, in which Favre assisted, was set up to see if Marth was selling fake autographs of the star Green Bay Packers quarterback.

A woman in Minnesota working with the FBI called Marth and said she would pay more than \$3,000 to have 250 Favre photos signed. Marth never had Favre sign the photos, but kept the money and returned the photos to the woman with the fake signatures on them. Marth initially said there were only 50 forged photos.

Accusations against Marth went deeper than the Favre photos, and Biskupic said there were thousands of collectibles, some sold for hundreds of dollars, with fake signatures.

"He cheated and violated children with absolutely no remorse," said citizen Michael Heili, who spoke on behalf of the prosecution during the sentencing.

Favre has not been involved in the case since he helped the FBI catch Marth.